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## *Supreme Court of Delaware—General Sessions, New Castle, May Term*, 1856.

THE STATE *vs.* CHARLES M. ALLMOND.

1. Legislative power is an attribute of sovereignty belonging to the people, to be exercised only by their representatives. The extent of the grant of it to the Legislature, with its reservations and restrictions, are to be found only in the Constitution itself.
2. The Legislature has power, as a *police* regulation, to prohibit the sale of intoxicating liquor; subject only to the laws of the United States regulating imports; and these protect it only in the hands of the importer, in the original cask or package.
3. Though a State is bound to admit an article thus imported under the laws of Congress, it is not bound to find a market for its sale.
4. When sold by the importer in the original cask or package, or when broken up for retail sale, it becomes subject to the State laws; and may be taxed, or the sale of it prohibited.
5. Property in an article is the right to *have* and *use* it *subject to law*. The right of *sale* is not an essential ingredient that may not be separated from the ownership; and a law regulating or prohibiting the sale, does not take away any vested right of property.
6. In the social state, individual property is necessarily held subject to such laws of regulation as are required for the well-being of society; and in a sovereign State, the legislature, having the power to pass such laws, must judge of its limits and extent.
7. The Act of 1855 *prohibiting* the sale of intoxicating liquor for any other than "mechanical, chemical and medicinal purposes only, and pure wines for sacramental use," saving the rights of the importer of foreign liquor under the importation laws, *is Constitutional*.

The defendant, who keeps a first class hotel in the city of Wilmington, was indicted for selling intoxicating liquor contrary to law. His case was selected, from many others of the same kind, to test the constitutionality of the act of last session, known as the prohibitory liquor law. It was tried at New Castle during the past week, before Judges HARRINGTON, WOOTTEN and HOUSTON, and excited much interest from the character of the questions, and

importance of interests, involved. It was argued at length, and with great ability, by

*Hon. J. A. Bayard* and *J. Wales*, *Willard Saulsbury* and *J. P. Comegys*, *Esqs.*, against, and by

*Hon. C. S. Layton* and *Messrs. Bradford*, *Bates* and *Smithers*, for the law.

The opinion of the court was delivered by

HARRINGTON, C. J.—The defendant moves, on constitutional grounds, to quash an indictment found against him for unlawfully selling intoxicating liquors, contrary to the Act of Assembly of February 27, 1855, entitled "An Act for the Suppression of Intemperance," without having a valid and subsisting license as a tavern-keeper under the Act of 1853, and without having a certificate to sell liquor under the Act of 1855.

This motion brings in question the validity of the act last referred to; and has opened up the whole subject of constitutional power of legislation, with its restrictions and qualifications; as well as the particular exercise of it in the provisions of the act which the defendant is supposed to have violated.

I proceed to express the opinion of the court on these questions.

The particular provisions of the act to which reference was made in the arguments are the following:

SECTION 1, Prohibits the sale of intoxicating liquors, except as afterwards provided, and makes it indictable; and makes proof of the disposal of such liquor by any person who is the keeper of, or interested in a tavern or other place of public entertainment, *prima facie* and presumptive evidence that such liquor was sold contrary to this act.

SEC. 2, Prohibits the giving or in anywise disposing of such liquors to any intoxicated person, or person of intemperate habits, as a beverage, and makes it indictable.

SEC. 3, Makes it unlawful and indictable to "own or keep" any such liquor, "with intent to sell the same" contrary to the act, and makes the possession of such liquor, by the accused, in a tavern or other place of public entertainment *prima facie* evidence that such liquor is kept for sale.

Other sections provide for the appointment of a limited number of persons to purchase and sell liquor for "mechanical, chemical and medicinal purposes only, and pure wines for sacramental use;" and for furnishing to every voter authority to sell to such persons, liquor manufactured by him, of fruit or grain, the growth of land in this State. But no license to purchase and sell shall be granted to any one "who uses intoxicating liquor as a beverage;" nor to any person who is at the time the keeper of or interested in any tavern "or other public house of entertainment." The persons so appointed are required to give security for duly observing the law.

SEC. 7, Punishes the making false statements with regard to the use of liquor bought of licensed vendors, and

SEC. 8, Provides that "if any intoxicated person shall be found in any public place, or disturbing the public peace and quiet," he shall be fined, and for non-payment, imprisoned.

The offences under sections 7 and 8 are to be tried before justices of the peace, with the right of appeal to this court, at any time within five days after conviction, on entering into recognizance with surety to appear and abide its judgment.

SEC. 18, Provides that the law shall not apply to the importer in respect to liquor imported under laws of the United States, and remaining in the original casks or packages, and so disposed of; but that "the custom house certificates of importation, and proof of marks on the casks or packages, corresponding thereto, shall not be received as sufficient evidence that the liquor contained in said casks or packages are those actually imported therein, but the person to be benefited thereby shall be required to allege and prove such fact *aliunde*.

SEC. 19, Excepts from the operation of the act, "cider or wine manufactured from fruits, being the growth of land in this State, owned or occupied by the manufacturer," and sold by him at the place where made, in quantity not less than one gallon at a time.

SEC. 21, Exempts the use of liquor medicinally by physicians; and

SEC. 27, Reserves rights under existing licenses, until their expiration.

This is a summary of the several sections of the act; but on the present motion it is unnecessary to decide any other than the general question of its constitutionality with reference to a person indicted under the first section.

Legislative power is an attribute of sovereignty. Whether derived from a written constitution, or existing prior to it, and merely recognized for the purpose of being assigned to the proper department, it is the same. In this State, it exists in the people at large, or has been delegated by them to representatives with certain reservations and restrictions, expressly named in the constitution, or necessarily implied from it, or such as may arise from the Federal Union, as expressed or necessarily implied in the Constitution of the United States.

The act under consideration has been assailed in the argument as opposed to both of these Constitutions, and as violating the State Constitution, both in its express restrictions and implied reservations. What these implications are, have not been, and cannot be, very satisfactorily explained; but it was argued that legislative power may be so *abused* in its exercise as to *exceed* its own delegated limits, and invade not merely the rights expressly reserved to the people, but certain innate, inalienable rights, existing in the citizen prior to the Constitution; and depending neither upon its recognition, nor reservation, for judicial enforcement.

It is not easy to embrace a definite idea of this sublimated right, without referring it to the acknowledged power of changing the Constitution itself at the will of those by whom, and for whose welfare it was made. Apart from this idea, it is difficult to conceive of any power to make or unmake law that has not been delegated to the people's representatives by the written Constitution, with the restrictions therein contained, and the reservations made by what is usually called the Bill of Rights. If there be any legislative power beyond or above this, it would seem to belong to the people themselves, to be exercised in the usual forms of organic change, or by revolution.

The innate or natural rights are comprehensively referred to in our Bill of Rights, which is believed to embrace, to the full extent,

this idea of a higher law, or the existence of rights paramount to the Constitution itself. "Through Divine Goodness (says the preamble to the Constitution) all men have by nature the rights of worshiping and serving their Creator according to their consciences, of enjoying and defending life and liberty, of acquiring and protecting reputation and property, and in general of attaining objects suitable to their condition, without injury one to another, and as these rights are essential to their welfare, for the due exercise thereof power is inherent in them."

But the great law of social self-preservation is equally a paramount law essential to the enjoyment of the natural rights thus declared to belong to "all men." Freedom of conscience cannot be secured; life and liberty cannot be enjoyed and defended; nor property and reputation acquired and protected; unless society has the power to compel its members to respect these rights by imposing sanctions, which, in the due course of law, shall even take away from those who would prevent others from the enjoyment of them, the rights thus declared to be natural rights, and which in fact constitute the existence of the social system.

For this purpose, government is instituted among men, having its sanctions both in the consent of the governed, and in the necessity of putting even innate rights under such control as is essential to their preservation. Hence the power to take life or restrain liberty; to regulate the use or forfeit the enjoyment of property in the due course of law; a power existing in the very structure and carried out in the practice of every community; particularly in those which give the best protection to these rights which are assumed to belong to all men.

If the higher rights to life, liberty and the enjoyment of property be thus subject to the sovereign power of the State, the power to regulate the use of property to secure the enjoyment of these rights, and promote the objects for which government is formed, cannot be doubted. The Legislature may by general laws regulate and restrict the use of property which it deems dangerous to the existence, peace or welfare of society, and may prevent the acquisition of such kinds of property as it considers so dangerous as to require such prohibi-

tion. The Legislature of this State has done so from the beginning, by prescribing the modes of acquiring and using the transfer and disposition of property of all kinds; and the restriction or prohibition not merely of certain kinds of property, but of trades, professions and callings; thus regulating not only property itself, but the personal industry and enterprise through which property is acquired. I refer to the statutes, among the first enacted, for the conveyance of property; the statute of wills; the intestate laws; all license laws; laws regulating physicians, surgeons, attorneys, millers, ferries and fisheries; laws regulating the weight and price of breadstuff, and laws regulating inn-keepers and vendors of liquor generally, which comes more directly to the matter under investigation.

As early as 1739, the act of 13 Geo. 2, prohibited the sale of spirituous liquor by measure less than a gallon, and punch or mixed liquors by any quantity whatever; and authorized certain officers to regulate the *price* of liquor lawfully sold under these restrictions. This legislation was followed by the act of June 24, 1786, "for the suppression of idleness, vice and immorality," which, with other acts of the same kind, was in terms saved by the Constitutions of 1792 and 1832. From that day to this the sale of liquor in this State has been under the restraint of laws more or less stringent, according to the will of the legislature; and the question now is, whether the last act "for the suppression of intemperance,"—that of 1855, differs in *principle* from the others; or whether the whole system of restrictive legislation has been unconstitutional from the beginning.

With the policy or wisdom of the act under consideration we have no concern. We did not make, and cannot repeal, this or any other law. Our official duty is merely to decide whether the act in question *is* a law, passed by competent authority, within the scope of legislative power. That duty will be performed without reference to any other considerations than such as apply to an abstract question of constitutional law, and the power of this tribunal, derived from the Constitution itself, to decide upon the validity of the act in question, as an expression of legislative will.

It is the province of the judiciary to decide what is law; to pro-

nounce invalid legislative acts unconstitutionally passed; and to annul such as may violate constitutional restrictions; but it may well be doubted whether a case can arise requiring of the judiciary the exercise of an assumed power to annul any act of legislation which the constitution itself does not condemn. Without a veto power existing in any other department, the Constitution of this State vests the whole legislative power in a Senate and House of Representatives who represent all the people in the exercise of this highest attribute of sovereignty. And when these representatives are supposed in any act of legislation unwisely, or improperly, to restrain what are assumed to be the rights of the people, it is for the people themselves to correct the evil through legislative repeal, and not by judicial usurpation.

The question, therefore, is whether the act of 1855 violates the Constitution of this State, or of the United States. The argument in respect to the latter has been that the restraints which it imposes on the traffic in foreign liquor affects the power of Congress to regulate commerce, and lessens the revenue derived from the importation of liquor as an article of merchandise. This question belongs appropriately to the federal courts, in which it has been repeatedly considered, with results which have even been the subject of dispute in the argument of this case. That *doubt* would be enough to settle this branch of the case; for no State Court would declare an act of its own legislation unconstitutional on a question of conflict with a power of Congress so doubtful in itself that the federal judiciary, after repeated trials, have not been able to define it. But we do not so understand their decisions.

The right of the government to import, and the right of the State to tax, regulate or restrict the sale of foreign goods, are both recognized by these decisions—(4 Wheat. Rep. 316, *McCullough* vs. *The State of Maryland*; 12 Wheat. Rep. 453, *Brown* vs. *Maryland*; and the *License Cases* in 5 Howard's Rep. 574.) The right of the one arises from the power to regulate commerce; that of the other exists as a police power, essential to the independence and sovereignty of the State. The judges differ about the precise line where imports cease to be protected from State legislation as imports, and

become, like all other property, subject to it; but the dispute is not whether the States have a right to tax or restrict imported goods after they are broken up, or sold by the importers, but whether these laws shall reach them in the importers' hands. The opinions of Judges Daniel and Thompson go even to that extent, while the judgment of the court only claims for imported goods immunity from State legislation while unbroken in the importers' hands; and that is precisely the exception contained in the 18th section of our law.

In what are usually called "the License Cases," the Supreme Court decided the following principles:—

That laws of Massachusetts providing that no person should sell spirituous liquor in less quantity than twenty-eight gallons, without a license to be granted by certain officers, and that such licenses should not be granted when, in the opinion of these officers, the public good did not require them to be granted;

That laws of Rhode Island forbidding the sale of such liquor in a less quantity than ten gallons, though the liquor sold was foreign liquor duly imported, and was bought of the importer; and,

That laws of New Hampshire imposing similar restrictions upon domestic liquor sent from one State to another, and sold in the original cask, were none of them liable to objection as infringing the Constitution or laws of the United States.

These decisions meet any objection that can be made against the Act of our legislature on these grounds. The cases were well considered; and, though the points ruled were necessarily confined to the question of conflict with the authority of Congress, the validity of such laws was fully recognized by all the judges of that court as within the scope of legislative power within the States.

Chief Justice Taney said, "Although a State is bound to receive and permit the sale by the importer of any article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary, or advisable, to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the

general government. And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper.

Mr. Justice Daniel said:—"Every State that is in any sense sovereign and independent, possesses, and must possess, the inherent power of controlling property held and owned within its jurisdiction and in virtue and under the protection of its own laws; whether that control be exerted in taxing it, or in determining its tenure, or in directing the manner of its transmission; and this too, irrespective of the quantities in which it is held or transferred, or the sources whence it may have been derived."

Mr. Justice Woodbury said:—"From the first settlement of this country, and in most other nations, ancient and modern, civilized or savage, it has been found useful to discountenance excesses in the use of intoxicating liquor."

Mr. Justice Grier said:—"The true question presented by these cases, and one which I am not disposed to evade, is, whether the States have a right to prohibit the sale and consumption of an article of commerce which they believe to be pernicious in its effects, and the cause of disease, pauperism and crime. It is not necessary, for the sake of justifying the State legislation now under consideration, to array the appalling statistics of misery, pauperism and crime which have their origin in the use or abuse of ardent spirits. The police power which is exclusively in the States, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority."

Mr. Justice McLean said:—"The acknowledged police power of a State extends often to the destruction of property." "The State may regulate the sale of foreign spirits, and such regulation is valid though it reduce the quantity of spirits consumed." A license may be required to sell foreign articles, when those of domestic manufactures are sold without one; and if the foreign article be injurious to

the health or morals of the community, a State may, in the exercise of that great and conservative police power which lies at the foundation of its prosperity, prohibit the sale of it."

It is true that these views of the judges of the Supreme Court have not the force of judgments binding on this court, and the same may be said of the State decisions directly on the question of legislative power. But they are the opinions of eminent Constitutional lawyers; and we might add the names of many other judges, as well as of common law writers in support of the same principles. We have seen no adjudged case which denies the power of a State in the exercise of its sovereignty to regulate the traffic in liquor for *restraint*, as well as for *revenue*; and, as a police measure, to restrict, or prohibit, the sale of liquor as injurious to public morals, or dangerous to public peace. The subjection of private property in the mode of its enjoyment to the public good, and its subordination to general rights liable to be injured by its unrestricted use, is a principle lying at the foundations of government. It is a condition of the social state; the price of its enjoyment; entering into the very structure of organized society; existing by necessity for its preservation, and recognized by the Constitution in the terms of its reservation, as "the right of acquiring and protecting reputation and property, and of attaining objects suitable to their condition, *without injury one to another.*"

We come then to consider whether the act of 1855, "for the suppression of intemperance," violates any of the provisions of the Constitution of this State; or is in any other way an unconstitutional exercise of legislative power. We have already considered this question with reference to what are supposed to be the innate, inalienable rights of citizens, and the powers of the judiciary to impose limits to legislative discretion, other than those imposed by the Constitution itself; and we have failed to discern the existence of such a power, with reference, at least, to the act of legislation which we are now reviewing. We will not say that it cannot be maintained with reference to any supposable case, so plainly tyrannical and unjust as to challenge universal condemnation; and yet it would be difficult to conceive a case of such legislation which would not vio-

late some of the provisions of the Constitution itself. It is unsafe to rest the existence of such a power upon the basis of so violent a presumption. It were better to presume that no such legislation could emanate from representatives of the people, to whom is committed legislative power, than to predicate on its abuse the right of another department, which has no legislative power, to review legislative acts upon any other ground than their conformity with constitutional restrictions.

A few instances of such supposed extreme legislation have been mentioned in the argument; yet no decision of this or of any other court has been cited which is founded on such a power. The language of Judge Chase in *Calder* vs. *Bull*, 3 Dallas, 386; and of the late Chief Justice of this court in *Rice* vs. *Foster*, 4 Harr., 479, may imply the claim of such a power in extreme cases, but neither the case then under consideration, nor the instances specified, required any such basis to support the opinion. They are all instances within the constitutional prohibition. A law that should make a man a judge in his own cause would violate the provision in section 8, for an *impartial* trial, and take away the remedy which it secures in all cases *by due course of law*, and an act which would subvert our republican form of government, would violate the entire Constitution of the State, and come in conflict with a provision of the Constitution of the United States, which guaranties this form of government to each of the States. The judgment in *Rice* vs. *Foster* imposed no limit on legislative power as existing in the General Assembly. It only denied the right to delegate that power to be exercised by a direct vote of the people themselves; a principle which has since been recognized, we believe, wherever it has been judicially considered.

Without denying the judicial power, therefore, in any supposable extreme case to annul a legislative act upon higher grounds than those of express constitutional restriction, we do not affirm it. Our case does not require it, and we are not ambitious of the distinction for this court of furnishing the first adjudged case founded on such a principle. The New York cases certainly do not furnish a precedent.

On the question whether the grant of legislative power was restricted not only by the express provisions of the written constitution, but might be further restrained by judicial construction as against fundamental principles of liberty, common reason and natural rights, all the judges in terms repudiated the doctrine, except Judge Comstock; and he recoiled from it, as Chief Justice Marshall did in *Fletcher* vs. *Peck*, 6 Cranch, 135, and avoided it by saying, what is eqully true in the case before us, that "there is no process of reasoning by which it can be demonstrated that the 'Act to prevent intemperance, pauperism and crime,' is void upon principles and theories outside of the constitution, which will not also, by an easier deduction, bring it in direct conflict with the constitution itself."

Judge Hubbard said "I am opposed to the judiciary attempting to set bounds to legislative authority, or declaring a statute invalid upon any fanciful theory of higher law, or first principles of natural right, outside the constitution.

Judge Selden. "To determine the extent of the law-making power, we have only to look to the provisions of the constitution. It has, and can have, no other limit than such as is there furnished, and the doctrine that there exists in the judiciary some vague, loose, and undefined power to annul a law, because in its judgment it is 'contrary to natural equity and justice,' is in conflict with the first principles of government, and can never, I think, be maintained.

Judge Johnson is equally emphatic in denying the power, and argues against it at some length, with great force and conclusiveness.

On this subject the case of *Sharpless and others* vs. *The Mayor of Philadelphia*, 9 Harris, 147, decided by the Supreme Court of Pennsylvania, presents, very fully, the arguments on both sides of the question, but the judgment of the court is against the power.

The act in question, therefore, is a police regulation plainly within the scope of legislative power, as conceded by all the cases cited, and by none more fully than the recent New York decisions upon the prohibitory liquor law of that State. And where the object is a legitimate one, any means which the legislature may em-

ploy to attain it are lawful, if not inhibited by the Constitution itself. The New York law, which authorizes the seizure and destruction of liquor in the hands of its owner, was held to impair the vested right of property thus lawfully possessed at the time of its passage, and we have no occasion to controvert the decision on that point, as our law contains no such provision. But we must dissent, and do dissent, from the position assumed by some of the judges in those cases, and in the argument here, that the prohibition to sell an article of merchandise destroys its character as property, and takes away the vested rights of the owner. If this were true, the sovereignty of the State would be robbed of nearly all its police power, and the individual right to dispose of his property would be above the right of the public to be protected in their morals, health, peace or safety. Poisonous drugs; unwholesome food; infected goods; demoralizing books or prints; combustible and explosive substances, dangerous animals, and every species of property could be held and transferred at the will of the owner. The vendible quality of a thing is not of the substance of the thing in such sense that they may not be lawfully separated, and the right to have or own a thing does not oblige the State to furnish a market for its sale. The right to sell it is conferred by law and may be taken away by law, or its use prohibited in any specified form which is deemed to be injurious or demoralizing. 1 Blac. Com., 138. Instances of this are so common in our legislation that I refer, in addition to such as have been mentioned, only to the prominent cases of the prohibition to sell slaves out of the State, and the prohibition of free negroes to *own* or *have in possession* fire-arms or warlike instruments.

Restrictions on the sale of liquor fall under the same police power, and have always been imposed by law. A license has been required not for the purpose of revenue only, but for the purpose of restraint, and as Judge McLean remarked in the case before referred to, "The necessity of a license presupposes a prohibition of the right to sell, as to them who have no license." The purchase of liquor under a license gives no power to sell without it; when the license expires the vendible character of the article, in that market, ceases

in his hands, and the 27th section of this act reserves the power of sale under all licenses before granted by virtue of any law of the State until such license expired.

As this consideration of the inviolability of the right of property is the point of difference between the judges of New York in the liquor cases referred to, and relied on in the argument, I shall examine them more particularly, to show that their views even of this question, would not be adverse to the validity of our law, on the principles assumed by them. If this be so, the defendant will be left without the authority of any adjudged case denying the power of the legislature to pass laws similar in character to the act under which he is indicted; unless it be the decision of a single judge in Indiana, expressed at chambers on the hearing of a habeas corpus case.

In the "Wynchamer case," Judge Comstock, while he regards the power of sale, we think erroneously, as "a fundamental right" of property essential to its character as property, places his judgment on the "physical destruction" of the liquor as a result of the law of New York. He says, "On the day the law took effect it was criminal to be in possession of intoxicating liquors, however innocently acquired the day before. It was criminal to sell them, and, under the law, therefore, no alternative was left to the owner but their immediate destruction."

Judge Hubbard admits that "there is no constitutional restriction on the power of the legislature in the *regulation* of the sale or traffic in intoxicating drinks, whether affecting existing rights of property in liquor or not. As a scheme of *regulation* the degree of the limitation of the sale or traffic is a matter of legislative discretion." But he proceeds to say that the fault of the law he was considering was that it did not profess to be a scheme of regulation. "The plain design of the law seems to have been to cut off the *liquor itself*, to insure its destruction by circumscribing the keeping of it, and authorizing its seizure if kept in a forbidden place, or with a criminal intent to sell. The entire right of sale within the State at least, is prohibited, and in this, in my judgment, consists the error of the law as it respects liquor owned when the law went

into operation. If there had been any right of sale within the State, reserved, for instance to a licensed vendor, although of minor importance, it would have been sufficient, perhaps, to have impressed the law with a character of regulation, and saved its validity."

Judge Seldon said, "while, therefore, I do not question the constitutionality of the general objects of the prohibitory law, and fully concede the power of the legislature to prohibit the sale of intoxicating liquors, for all except mechanical, chemical and medicinal purposes, I cannot admit that it has the right to compel their *immediate and unconditional destruction*, as is, I think, substantially done by this law."

Judge A. S. Johnson.—"I am not prepared to say that the legislature may not, under the constitution, take away the right of sale to the extent which this act contemplates. But by a general prohibition of sale, irrespective of quantity and purpose, coupled with a prohibition even to keep it, except in a dwelling house where no store, &c., is kept, and in places where certain arts and trades are carried on, the legal existence which the law and the constitution designate as property, is, in my judgment broken up, and the private injury is as completely effected as if the thing were physically taken away." "This scheme taken together, in my judgment is a scheme not of regulation, but of legal destruction of property, which, as much as any other, was under the protection of the Constitution."

Each of the judges therefore, who decided against the constitutionality of the prohibitory liquor law of New York, based his opinion on grounds of objection not applicable to the act of our legislature, and sustained the principle of restrictive legislation to the full extent required to support its validity. The distinction upon which the majority went between the power to prohibit, and the power to regulate, was of course denied by the minority, and is not important in the decision of the case before us. We think it cannot be maintained. If the power exist, the extent to which it shall be exercised must be in the discretion of the legislature, provided it be not merely colorable; and this was the view of the Supreme Court in the "License cases." The point was there made in argu-

ment, and was important. The law of Massachusetts gave the license commissioners power to refuse all licenses, and they practically exerted it. Mr. Webster contended that there was no difference, (as there is none) in substance between an absolute prohibition by the legislature, and a grant of power to another body to prohibit. The law was therefore prohibitory of retailing liquor under twenty-eight gallons. But none of the judges recognized the distinction; some of them repudiated it. Judge Catron said, "I admit as inevitable that if the State has the power of restraint by licenses to any extent, she has the discretionary power to judge of its limit, and may go to the length of prohibiting sales altogether, if such be her policy."

If we were to hold, therefore, that the act of our legislature which restrains, and we admit very closely restrains, the sale of intoxicating liquor, was unconstitutional, we should go beyond any case heretofore adjudged, denying, on constitutional grounds, the power of the legislature to *regulate* this kind of property for the protection of the health and morals of the community; a police power recognized in the theory, and asserted in the practice, of this and perhaps every other State. We should overrule case after case decided in other States on acts not to be distinguished from ours in principle, and disregard the opinions of the ablest judges, including every judge of the Supreme Court of the United States who has expressed an opinion on the question. We should oppose the long continued and well settled practice of our own State, commencing with its earliest history, in a course of legislation on the same subject, differing only in *degree* and not in *principle* from the act in question; and we should in effect repeal a large number of laws, which, for other purposes, assert the right of government to *regulate* the use and enjoyment of private property for the public good. Whatever may be supposed to be the objections to this law founded on its expediency or policy, or its injurious operation upon the large amount of property invested in the trade which it restrains, this court cannot assume the power to annul it on any such considerations.

The principles before stated sustain the general provisions of this law as within legislative power and not prohibited by any express

constitutional restrictions. The duty of the court therefore is simply to pronounce it a law constitutionally enacted, and to leave all other questions with regard to it where such questions properly belong, with the people's representatives, and the people themselves. If it impose unnecessary restraints on the use or transfer of property; if it unwisely restrain any of their liberties, either in a restricted or more general sense; if its policy be doubtful, or its precedent dangerous, it is at most but an abuse of legislative power, to be remedied by the people, whose rights it is supposed to invade, in the constitutional mode of legislative repeal. If, on the contrary it contain the elements of reform for an admitted social evil, and is, what its authors designed it to be, and its friends insist it is, an Act for the Suppression of Intemperance, its wisdom and expediency will be ultimately vindicated by the people, as its constitutionality has been on the present trial, in the opinion of the court.

The motion to quash the indictment is therefore denied.

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## *In the Cincinnati Superior Court, Special Term, June,* 1855.

CHARLES ATWATER *vs.* WILLIAM F. ROELOFSON ET AL.[1]

1. A. loaned E. A. $10,000; the loan was made in the city of Cincinnati, and was received in a draft drawn by D. in Cincinnati on A. in New Haven, which was accepted payable in New York, and there paid.
2. To secure the payment of said loan, E. A. by her attorney executed a promissory note for $10,000, payable five years after date, and also ten other notes for the sum of five hundred dollars each, payable semi-annually, being the interest notes on said loan at the rate of ten per cent; all said notes were payable at the office of the Ohio Life Insurance and Trust Co., N. Y.

   To secure the payment of said notes, E. A. executed a mortgage to A. on certain real estate in the city of Cincinnati.

   In suit brought in Cincinnati to collect the amount of these notes, and to foreclose this mortgage.
3. *Held:* That the law of Ohio, (where it was lawful to contract for ten per cent. interest,) governed the construction of this contract, and not the law of New York, where a similar contract would have been void for usury.

[1] From 2 Handy's Sup. Court, Rep. 19; We are indebted to the Messrs. Handy, for the early sheets of their volume from which this case is taken.